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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

FRANCO CARACCIOLI,
Plaintiff,
v.
FACEBOOK, INC.,
Defendant.

Case No. [5:15-cv-04145-EJD](#)**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS; DENYING
PLAINTIFF'S MOTION FOR LEAVE
TO FILE SECOND AMENDED
COMPLAINT**

Re: Dkt. Nos. 17, 21

With the rise of social media on the internet, many people choose to make public the aspects of their lives that would otherwise be known to few. Social media networks can also be easily misused, however, by those motivated to impermissibly reveal the private matters of others. Plaintiff Franco Caraccioli ("Plaintiff") alleges in this case that someone posted private images and videos to a webpage without his consent and disseminated that material to his unsuspecting online network of friends, family and professional contacts. He asked Defendant Facebook, Inc. ("Facebook") to remove the webpage, but was unsatisfied with Facebook's response. He filed this action for damages against Facebook as a result.

Two matters are now before the court. In the first, Facebook moves to dismiss Plaintiff's claims because it argues they contradict Facebook's Terms of Service and are barred by the Communications Decency Act. In the second, Plaintiff seeks leave file a second amended complaint that includes an additional claim. Having carefully considered the parties' arguments for and against these motions, this court has determined that Plaintiff cannot maintain this case either as pled or as re-pled in an amended complaint. Accordingly, Facebook's motion will be

1 granted, all claims will be dismissed without leave to amend, and Plaintiff's motion will be
2 denied.

3 **I. BACKGROUND**

4 According to Plaintiff, a law student, “[t]his is a case about one of the most powerful
5 corporations in the world, a corporation that maliciously recreated obscene or pornographic sexual
6 content on a personal profile named ‘Franco Caraciolijerkingman’ . . . inside its online digital
7 community” First Am. Compl. (“FAC”), Dkt. No. 4, at ¶¶ 1, 10. The referenced corporation
8 is Facebook, which is a Delaware corporation¹ that provides “a social networking Website that
9 connects people with their friends, families and other online communities.” Id. at ¶¶ 12, 14.

10 Plaintiff alleges that, on September 14, 2014, “an account who’s creator is still
11 unascertainable” created a Facebook account entitled “Franco Caraciolijerkingman” (the “suspect
12 account”). Id. at ¶ 27. This account “included videos and pictures of [Plaintiff] sexually arousing
13 or pleasuring himself” Id. at ¶ 29. Plaintiff became aware of the account because it sent him
14 a “friend request.” Id. at ¶ 28. He believes a similar request “was sent to every friend [Plaintiff]
15 has in his community because of the amount of messages or calls he received that day.” Id. at ¶
16 31.

17 After becoming aware of the account, Plaintiff reported it to Facebook and demanded that
18 it be deleted “because of the humiliating sexual nature of the content.” Id. at ¶ 30. He clicked on
19 several of the photos and videos published with the account “in order to report or notify”
20 Facebook with his own personal account. Id. at ¶ 32, 33. Many of his friends and family
21 members informed Plaintiff they would also report the account to Facebook and ask that it be
22 deleted. Id. at ¶ 34-36. Plaintiff, however, received other calls and messages that he alleges were
23 made “solely to humiliate, mock, ridicule, or embarrass” Plaintiff. Id. at ¶ 37.

24 The day after his report, Plaintiff received an email from Facebook in which it admitted
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26 ¹ Although the amended complaint claims something different, subject matter jurisdiction arises
27 based on diversity of citizenship. Dkt. Nos. 11, 15.

1 receiving notifications concerning the account but stating it had reviewed the account and
2 “determined that Franco Caracciolijerkingman is a person who’s using Facebook in a way that
3 follows the Facebook Community Standards.”” Id. at ¶ 38. Subsequently, Plaintiff sent an email
4 to Facebook suggesting he would take legal action. Id. at ¶ 43. Plaintiff alleges that Facebook
5 then deleted the account the following day. Id. at ¶ 44.

6 Plaintiff initiated this action on September 11, 2015, and filed an amended complaint on
7 September 18, 2015.² He asserts the following claims under California law: (1) defamation, (2)
8 libel, (3) intrusion upon seclusion, (4) public disclosure of private facts, (5) false light, (6)
9 intentional infliction of emotional distress, (7) negligent infliction of emotional distress, (8) breach
10 of contract, (9) negligent supervisions and retention, and (10) violation of the Unfair Competition
11 Law (“UCL”), Business and Professions Code § 17200 et seq. These motions followed.

12 **II. LEGAL STANDARD**

13 **A. Federal Rule of Civil Procedure 12(b)(6)**

14 Federal Rule of Civil Procedure 8(a) requires a plaintiff to plead each claim with sufficient
15 specificity to “give the defendant fair notice of what the . . . claim is and the grounds upon which
16 it rests.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal quotations omitted).
17 The factual allegations “must be enough to raise a right to relief above the speculative level” such
18 that the claim “is plausible on its face.” Id. at 556-57. A complaint which falls short of the Rule
19 8(a) standard may be dismissed if it fails to state a claim upon which relief can be granted. Fed. R.
20 Civ. P. 12(b)(6). “Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a
21 cognizable legal theory or sufficient facts to support a cognizable legal theory.” Mendiondo v.
22 Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008).

23 When deciding whether to grant a motion to dismiss, the court must generally accept as
24 true all “well-pleaded factual allegations.” Ashcroft v. Iqbal, 556 U.S. 662, 664 (2009). The court
25 must also construe the alleged facts in the light most favorable to the plaintiff. Love v. United

27 ² Another copy of the amended complaint was filed on September 21, 2015. Dkt. No. 8.

1 States, 915 F.2d 1242, 1245 (9th Cir. 1988). However, “courts are not bound to accept as true a
2 legal conclusion couched as a factual allegation.” Iqbal, 556 U.S. at 678.

3 Also, the court generally does not consider any material beyond the pleadings for a Rule
4 12(b)(6) analysis. Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n. 19
5 (9th Cir. 1990). Exceptions to this rule include material submitted as part of the complaint or
6 relied upon in the complaint, and material subject to judicial notice. See Lee v. City of Los
7 Angeles, 250 F.3d 668, 688-69 (9th Cir. 2001).

8 **B. Pro Se Pleadings**

9 Where, as here, the pleading at issue is filed by a plaintiff proceeding pro se, it must be
10 construed liberally. Resnick v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000). In doing so, the court
11 “need not give a plaintiff the benefit of every conceivable doubt” but “is required only to draw
12 every reasonable or warranted factual inference in the plaintiff’s favor.” McKinney v. De Bord,
13 507 F.2d 501, 504 (9th Cir. 1974). The court “should use common sense in interpreting the
14 frequently diffuse pleadings of pro se complainants.” Id. A pro se complaint should not be
15 dismissed unless the court finds it “beyond doubt that the plaintiff can prove no set of facts in
16 support of his claim which would entitle him to relief.” Haines v. Kerner, 404 U.S. 519, 521
17 (1972).

18 **III. DISCUSSION**

19 As noted, Facebook challenges Plaintiff’s claims on two grounds. First, it argues that
20 Plaintiff’s allegations fail to state a claim because they contradict Facebook’s Terms of Service.
21 Second, Facebook contends this lawsuit is barred by § 230(c) of the Communications Decency
22 Act. These arguments are discussed below.

23 **A. Facebook’s Terms of Service**

24 Facebook requires users agree to its Terms of Service.³ Decl. of Daniel E. Lassen, Dkt.

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26 ³ For this motion, the court considers the version of the Terms of Service revised on January 30, 2015, since Plaintiff attached this version to his complaint. At the motion hearing, Plaintiff
27 speculated that he agreed to different terms when he created his own Facebook account several

1 No. 17, at Ex. A (“By using or accessing the Facebook Services, you agree to this Statement, as
2 updated from time to time . . .”). Among its provisions are those addressing “Safety,” through
3 which users commit not to “bully, intimidate, or harass any user,” not to post content that is “hate
4 speech, threatening, or pornographic; incites violence; or contains nudity or graphic or gratuitous
5 violence,” and not to “use Facebook to do anything unlawful, misleading, malicious, or
6 discriminatory.” Id. at § 3. There is also a section entitled “Protecting Other People’s Rights,”
7 which prohibits users from posting content or taking any action that “infringes or violates
8 someone else’s rights or otherwise would violate the law,” and provides the Facebook “can
9 remove any content or information you post . . . if we believe that it violates” the Terms of Service
10 or other policies. Id. at § 5. Furthermore, there is a disclosure which states:

11 Although we provide rules for user conduct, we do not control or
12 direct users’ actions on Facebook and are not responsible for the
13 content or information users transmit or share on Facebook. We are
14 not responsible for any offensive, inappropriate, obscene, unlawful
15 or otherwise objectionable content or information you may
16 encounter on Facebook. We are not responsible for the conduct,
17 whether online or offline, of any user of Facebook.

18 Id. at § 15.

19 Another disclosure is emphasized in majuscule and provides in relevant part:

20 WE TRY TO KEEP FACEBOOK UP, BUG-FREE, AND SAFE, BUT YOU USE IT AT
21 YOUR OWN RISK. WE ARE PROVIDING FACEBOOK AS IS WITHOUT ANY
22 EXPRESS OR IMPLIED WARRANTIES INCLUDING, BUT NOT LIMITED TO, IMPLIED
23 WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND
24 NON-INFRINGEMENT. WE DO NOT GUARANTEE THAT FACEBOOK WILL ALWAYS
25 BE SAFE, SECURE OR ERROR-FREE OR THAT FACEBOOK WILL ALWAYS FUNCTION
26 WITHOUT DISRUPTIONS, DELAYS OR IMPERFECTIONS. FACEBOOK IS NOT
27 RESPONSIBLE FOR THE ACTIONS, CONTENT, INFORMATION, OR DATA OF THIRD
28 PARTIES, AND YOU RELEASE US, OUR DIRECTORS, OFFICERS, EMPLOYEES, AND
AGENTS FROM ANY CLAIMS AND DAMAGES, KNOWN AND UNKNOWN, ARISING
OUT OF OR IN ANY WAY CONNECTED WITH ANY CLAIMS YOU HAVE AGAINST
ANY SUCH THIRD PARTIES.

Id.

Facebook argues the Terms of the Service foreclose all of Plaintiff’s claims. Specifically,

years ago. That possible inconsistency is of no moment to a review of his pleading with the
updated Terms of Service attached.

1 Facebook contends the court should disregard one particular allegation critical to Plaintiff's
2 theory; that Facebook "recreated, sponsored, republished, and/or acted as a speaker of the content"
3 of the suspect account "by deciding to continue displaying it as opposed to deleting it." The court
4 agrees this allegation should be disregarded under well-established rules applicable in this context.

5 For a motion under Rule 12(b)(6), the Ninth Circuit has recognized that the district court
6 "need not . . . accept as true allegations that contradict matters properly subject to judicial notice or
7 by exhibit." Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001); see Warren v.
8 Fox Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003) (holding the court is "not
9 required to accept as true conclusory allegations which are contradicted by documents referred to
10 in the complaint."). "Nor is the court required to accept as true allegations that are merely
11 conclusory, unwarranted deductions of fact, or unreasonable inferences." Sprewell, 266 F.3d at
12 979. Applying these rules to Plaintiff's pleading means the court does not presume the truth of the
13 allegation that Facebook somehow became the publisher of content on the suspect account when
14 Facebook purportedly reviewed it and then did not terminate it. This is because Plaintiff, by
15 relying on the January 30th Terms of Service in the operative version of the complaint, cannot
16 contradict the provision clarifying that Facebook is not responsible for content shared by other
17 users, including any content that is "offensive, inappropriate, obscene, unlawful or otherwise
18 objectionable." Plaintiff must accept the Terms of Service he incorporated into his pleading as a
19 whole, not just those provisions that benefit his cause.⁴

20 Without the "republication" allegation, Plaintiff has not stated a claim for defamation,
21 libel, false light, or public disclosure of private facts because each of those claims presume a
22 publication made by the defendant. Burrill v. Nair, 217 Cal. App. 4th 357, 351 (2013)
23 ("Defamation requires the intentional publication of a false statement of fact that has a natural
24 tendency to injure the plaintiff's reputation or that causes special damage."); Cal. Civ. Code § 45

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27 ⁴ The "republication" allegation could also be disregarded as a legal conclusion cast as a factual
28 allegation. See W. Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).

1 (“Libel is a false and unprivileged publication”); Selleck v. Globe Int’l, Inc., 166 Cal. App.
2 3d 1123, 1133 (1985) (“An action for invasion of privacy by placing the plaintiff in a false light in
3 the public eye . . . is in substance equivalent to a libel claim.”); Taus v. Loftus, 40 Cal. 4th 683,
4 724 (2007) (establishing a “public disclosure” as an element of public disclosure of private facts).
5 Nor has he stated a claim for intrusion upon seclusion or intentional infliction of emotional
6 distress because those claims require intent on the part of the tortfeasor. Taus, 40 Cal. 4th at 724
7 (specifying that intrusion upon seclusion requires an intentional intrusion); Christensen v. Super.
8 Ct., 54 Cal. 3d 868, 903 (1991) (providing that, to prove intentional infliction of emotional
9 distress, the plaintiff must show the defendant acted intentionally). In addition, he cannot
10 maintain a claim for negligent supervision and hiring since, as pled, the claim relies on
11 “republication” as the basis for Facebook’s liability. FAC, at ¶ 194 (“[Facebook] negligently
12 failed to investigate the background of [Facebook] employees . . . to prevent republication of
13 sexual or otherwise unlawful content in [Facebook’s] website.”).

14 The Terms of Service are also fatal to Plaintiff’s claims for negligent infliction of
15 emotional distress and breach of contract. Negligent infliction of emotional distress is a species of
16 negligence (Huggins v. Longs Drugs Stores Cal., Inc., 6 Cal. 4th 124, 129 (1993)), which under
17 California law has three elements: (1) the defendant owed a legal duty to use due care, (2) a breach
18 of that duty, and (3) the breach was the proximate or legal cause of the resulting injury. Ladd v.
19 Cnty. of San Mateo, 12 Cal. 4th 913, 917 (1996). To properly plead breach of contract, “[t]he
20 complaint must identify the specific provision of the contract allegedly breached by the
21 defendant.” Donohue v. Apple, Inc., 871 F. Supp. 2d 913, 930 (N.D. Cal. 2012) (citing
22 Progressive West Ins. Co. v. Super. Ct., 135 Cal. App. 4th 263, 281 (2005)). Here, Plaintiff uses
23 the Terms of Service to both define Facebook’s duty for negligence and its obligations for breach
24 of contract. FAC, at ¶ 162 (“Facebook owed a duty to [Plaintiff] based on the ‘Terms of Service’
25 agreed and [Facebook] breached this duty by republishing or recreating in whole the [suspect
26 account].”); ¶ 181 (“[Facebook] breached their contractual duty under the ‘Terms of Service’

1 .”). But as another court has correctly recognized, while Facebook’s Terms of Service “place
2 restrictions on users’ behavior,” they “do not create affirmative obligations.” Young v. Facebook,
3 Inc., No. 5:10-cv-03579-JF/PVT, 2010 U.S. Dist. LEXIS 116530, at *11, 2010 WL 4269304
4 (N.D. Cal. Oct. 25, 2010). Plaintiff, therefore, cannot base these claims on the Terms of Service.

5 Finally, Plaintiff’s UCL claim is tethered to the allegations stated for his other claims.
6 FAC, at ¶ 206. As those claims fail, so does the one for violation of the UCL. See Franczak v.
7 Suntrust Mortg. Inc., No. 5:12-cv-01453 EJD, 2013 U.S. Dist. LEXIS 126977, at *19, 2013 WL
8 4764327 (N.D. Cal. Sept. 5, 2013).

9 In his opposition, Plaintiff makes several arguments in an effort to avoid the Terms of
10 Service. Aside from stating that his allegations do not contradict the Terms of Service, he also
11 believes Facebook has unclean hands and that the “boilerplate terms” of the documents are
12 unconscionable. Plaintiff invites a misuse of these doctrines, however. “Unclean hands is an
13 *affirmative defense* in actions seeking equitable relief.” Wilson v. S.L. Rey, Inc., 17 Cal. App. 4th
14 234, 244 (1993) (emphasis added). The doctrine of unconscionability is likewise “a *defense* to
15 enforcement of a contract.” Cal. Grocers Assn. v. Bank of America, Nat’l Trust & Savings Ass’n,
16 22 Cal. App. 4th 205, 217 (1994) (emphasis added). Here, it is Plaintiff, not Facebook, who
17 asserts a breach of contract claim based on the Terms of Service. He therefore cannot attempt to
18 counter Facebook’s arguments with defenses reserved for a defendant.

19 Because the allegations in the amended complaint contradict the incorporated Terms of
20 Service, all of Plaintiff’s claims must be dismissed.

21 **B. Communications Decency Act**

22 Section 230 of the Communications Decency Act “immunizes providers of interactive
23 computer services against liability arising from content created by third parties.” Fair Hous.
24 Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1162 (9th Cir. 2008)
25 (en banc). To that end, § 230(c)(1) states that “[n]o provider or user of an interactive computer
26 service shall be treated as the publisher or speaker of any information provided by another

1 information content provider.” 47 U.S.C. § 230(c)(1). The purpose of § 230(c) immunity is to
2 spare interactive computer service providers the “grim choice” of becoming fully responsible for
3 third-party content “by allowing them to perform some editing on user-generated content without
4 thereby becoming liable for all defamatory or otherwise unlawful messages that they didn’t edit or
5 delete.” Roommates.com, 521 F.3d at 1163. As the Ninth Circuit observed, “[m]aking interactive
6 computer services and their users liable for the speech of third parties would severely restrict the
7 information available on the Internet.” Batzel v. Smith, 333 F.3d 1018, 1027-28 (9th Cir. 2003).
8 “Section 230 therefore sought to prevent lawsuits from shutting down websites and other services
9 on the Internet.” Id. at 1028.

10 Broken into elements, § 230(c) will require dismissal of Plaintiff’s state law claims if: (1)
11 “Facebook is a ‘provider or user of an interactive computer service,’” (2) the information for
12 which Plaintiff seeks to hold Facebook liable was ““information provided by another information
13 content provider,”” and (3) “the complaint seeks to hold Facebook as the ‘publisher or speaker’ of
14 that information.” Klayman v. Zuckerberg, 753 F.3d 1354, 1357 (D.C. Cir. 2014) (quoting 27
15 U.S.C. § 230(c)(1)); see Sikhs for Justice “SFJ”, Inc. v. Facebook, Inc., No. 15-cv-02442, 2015
16 U.S. Dist. LEXIS 154716, at *9, 2015 WL 7075696 (N.D. Cal. Nov. 13, 2015); see also 47 U.S.C.
17 § 230(e)(3) (“No cause of action may be brought and no liability may be imposed under any State
18 or local law that is inconsistent with this section.”).

19 Plaintiff’s amended complaint satisfies each element. Taking them in order, Plaintiff does
20 not vigorously dispute that Facebook “provides or enables computer access by multiple users to a
21 computer service.” 47 U.S.C. § 230(f)(2). As such, the court finds, as others have previously, that
22 Facebook provides an interactive computer service. See Klayman, 753 F.3d at 1357; see also
23 Sikhs for Justice, 2015 U.S. Dist. LEXIS 154716, at *10; see also Fraley v. Facebook, Inc., 830 F.
24 Supp. 2d 785, 801 (N.D. Cal. 2011).

25 Turning to the second element, it is evident that Plaintiff seeks to hold Facebook liable for
26 content that was provided by a third party because he alleges in the amended complaint that
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1 someone or something other than Facebook created the suspect account, specifically a “creator is
2 still unascertainable.” FAC, at ¶ 27. Though he relies on several cases to suggest that Facebook
3 itself either “provided” or “materially contributed to” the content on the suspect account through
4 the limited conduct alleged in the amended complaint, such argument is unpersuasive because the
5 facts of those cases are unique and distinguishable.

6 For example, in Fraley v. Facebook, the court found that Facebook qualified as an
7 “information content provider” under 47 U.S.C. § 230(f)(2) because it was alleged to have taken
8 users’ names, photographs and likenesses “to create new content that it publishes as endorsements
9 of third-party products or services.” 830 F. Supp. 2d at 801. And in Fair Housing Council of San
10 Fernando Valley v. Roommates.com, LLC, the Ninth Circuit found the defendant “much more
11 than a passive transmitter of information provided by others” when its website required users to
12 respond to a series of questions and then assembled the answers into a “profile page.” 521 F.3d at
13 1166. The court held under those particular facts that the defendant was “undoubtedly the
14 ‘information content provider’ as to the questions and can claim no immunity for posting them on
15 its website, or forcing subscribers to answer them as a condition of using its services.” Id. at 1164.

16 Here, in contrast to Fraley and Roommates.com, Plaintiff does not allege that Facebook
17 actually created, developed or posted the content on the suspect account. He instead contends the
18 identity of the creator is unknown, but that Facebook should be deemed responsible for the
19 account because it reviewed it and decided not to remove it. Liability based on that sort of
20 vicarious responsibility, however, is exactly what § 230(c) seeks to avoid. See Roommates.com,
21 521 F.3d at 1163; see also Batzel, 333 F.3d at 1029 (“Without the immunity provided in Section
22 230(c), users and providers of interactive computer services who review material could be found
23 liable for the statements of third parties, yet providers and users that disavow any responsibility
24 would be free from liability.”).⁵

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26 ⁵ Plaintiff argued at the hearing that applying the § 230(c) bar to his claims would permit
Facebook to escape liability for what he termed “reckless” or “malicious” conduct. But aside from
27 the lack of factual allegations in the amended complaint supporting these adjectives, Plaintiff did
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1 Finally, Plaintiff's "republication" theory falls squarely within the third element because it
2 would hold Facebook liable as the as the publisher or speaker of the content on the suspect
3 account. For this element, "what matters is not the name of the cause of action . . . what matters is
4 whether the cause of action inherently requires the court to treat the defendant as the 'publisher or
5 speaker' of content provided by another." Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1101-1102 (9th
6 Cir. 2009). "To put it another way, courts must ask whether the duty that the plaintiff alleges the
7 defendant violated derives from the defendant's status or conduct as a 'publisher or speaker.'" Id.
8 at 1102. Since, as discussed above, all of Plaintiff's claims rely on the allegation that Facebook
9 became the republisher of the suspect account, "section 230(c)(1) precludes liability." Id.

10 Plaintiff proposes that this case is distinct from others to which §230(c) has applied
11 because, according to him, the content on the suspect account was "facially objectionable" which
12 Facebook "should have and could have easily deleted." In other words, he classifies this case as
13 one involving editorial inaction rather than affirmative editorial action. But the Ninth Circuit has
14 already explained why this distinction makes no difference. "[P]ublication involves reviewing,
15 editing, and deciding whether to publish or to withdraw from publication third-party content." Id.
16 "[R]emoving content is something publishers do, and to impose liability on the basis of such
17 conduct necessarily involves treating the liable party as a publisher of the content it failed to
18 remove." Id. at 1103. Plaintiff's illusory clarification aside, he cannot escape the fact that his
19 theory runs afoul of the way in which § 230(c) has been interpreted and applied.

20 Based on the foregoing, the immunity bestowed on interactive computers service providers
21 by § 230(c) prohibits all of Plaintiff's claims against Facebook. Facebook's motion to dismiss
22 will be granted on this and the preceding basis concerning the Terms of Service.

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25 not cite to authority establishing that the recklessness or maliciousness of a provider's behavior is
26 part of the inquiry under § 230(c). The two district court opinions he relied on for this argument,
27 Sherman v. Yahoo! Inc., 997 F. Supp. 2d 1129 (2014), and Holomaxx Techs. v. Microsoft Corp.,
783 F. Supp. 2d 1097 (2011), are inapposite because they each discuss another provision of §
230(c) not at issue here.

C. Leave to Amend

The court must now decide whether Plaintiff should be permitted leave to amend the existing claims. Leave to amend is generally granted with liberality. Fed. R. Civ. P. 15(a)(2) (“The court should freely give leave when justice so requires.”); Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir.1990). Leave need not be granted, however, where the amendment of the complaint would cause the opposing party undue prejudice, is sought in bad faith, constitutes an exercise in futility, or creates undue delay. Foman v. Davis, 371 U.S. 178, 182 (1962); Janicki Logging Co. v. Mateer, 42 F.3d 561, 566 (9th Cir. 1994). Because Plaintiff’s claims against Facebook are barred as a matter of law by § 230(c), the court finds that allowing for their amendment would be futile. See Sikhs for Justice, 2015 U.S. Dist. LEXIS 154716, at *18. They will be dismissed without leave to amend. Id.

The court has also considered Plaintiff's motion for leave to file a second amended complaint, through which he seeks to add a claim for unauthorized use of his likeness under California Civil Code § 3344. To state a claim for violation of § 3344, a plaintiff must allege the elements of a common law misappropriation claim: ““(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.”” Downing v. Abercrombie & Fitch, 265 F.3d 994, 1001 (9th Cir. 2001) (quoting Eastwood v. Super. Ct., 149 Cal. App. 3d 409, 417 (1983)). In addition, the plaintiff must allege “a knowing use by the defendant as well as a direct connection between the alleged use and the commercial purpose.” Id.

In his proposed amended pleading, Plaintiff relies on the same unsuccessful “republication” theory in order to allege that “Facebook knowingly used Plaintiff’s photographs, videos, and name or likeness for commercial use” But just like his other claims, the § 3344 claim seeks to hold Facebook liable for third-party content on the suspect account. The claim would therefore be subject to dismissal as barred by § 230(c) in the same was his Plaintiff’s other claims. Accordingly, his motion for leave to file a second amended complaint will be denied because allowing Plaintiff to assert the proposed § 3344 claim would be futile. See *Saul v. United*

1 States, 928 F.2d 829, 843 (9th Cir. 1991) (“A district court does not err in denying leave to amend
2 where the amendment would be futile . . . or would be subject to dismissal.”).

3 **IV. ORDER**

4 Based on the foregoing, Facebook’s Motion to Dismiss is GRANTED. Plaintiff’s claims
5 are DISMISSED WITHOUT LEAVE TO AMEND. Plaintiff’s Motion for Leave to File a Second
6 Amended Complaint is DENIED.

7 Judgment will be entered in favor of Facebook and the Clerk shall close this file.

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9 **IT IS SO ORDERED.**

10 Dated: March 7, 2016

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12 EDWARD J. DAVILA
13 United States District Judge

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United States District Court
Northern District of California